IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 927

JOHNNY WILLIAMS,

Petitioner,

vs.

FLORIDA.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF FOR PETITIONER

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I.

Opinion Below

The opinion of the District Court of Appeal of Florida, Third District, dated April 29, 1969, is reported at 224 So. 2d 406 (R. 93, App. p. 13).[1]

II.

Jurisdiction—Constitutional Provisions Involved

The petition for certiorari to this Court, directed to the District Court of Appeal of Florida, Third District, was granted December 8, 1969 (R. 95). Jurisdiction is conferred

[1] R. designates the record appendix. App. designates the appendix to this brief.

upon this Court by 28 U.S.C., §1257(3), because the trial court's failure to protect petitioner from disclosing the name of his alibi witness forced petitioner to be witness against himself and the empanelling of a six man jury over petitioner's objection constituted a denial of a jury trial, both of which constitute violations of due process of law.

III.

Questions of Law Presented

A. Is it a denial of due process and right not to be a witness against yourself for petitioner to be compelled to advise the state of his alibi witnesses?

B. Is it a denial of due process to deny petitioner's motion to be tried by a twelve man jury?

IV.

Statement of the Case

Defendant on trial for robbery, moved (R. 5) for an order protecting him from disclosure of his alibi witnesses, required by Florida Rules of Criminal Procedure[2] on the grounds *inter alia*:

> The notice of alibi rule compels the Defendant in a criminal case to be a witness against himself in violation of the Florida Declaration of Rights, Section 12 and the Fifth and Fourteenth Amendment of the United States Constitution.

[2] Fla. Cr. P.R. 1.200 (App. p. 11).

and also for the court to empanel a twelve man jury[3] (R. 3, 9 & 87).

The motions were denied (R. 4 & 6) and defendant complied with the demand after which the alibi witness was subpoenaed to the state attorney's office prior to trial to present her testimony (R. 58). The petitioner was convicted and sentenced to life (R. 86).

ARGUMENT

I.

Pretrial Disclosure of Alibi Witnesses Compels Defendant to Be a Witness Against Himself

The requirement that the defendant disclose his alibi witnesses to the prosecuting attorney prior to trial or be unable to use them violates the Fifth Amendment.[4]

> No person * * * shall be compelled in any criminal case to be a witness against himself.

While this Amendment ordinarily tests patently incriminating practices,[5] the literal mandate is "to be a witness against himself". It is this mandate which is violated because while the alibi witness rule is only latently and

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[3] Fla. Stat. 913.10 provides for a six-man jury in non-capital cases (App. p. 12).

[4] *Malloy* v. *Hogan*, 378 U.S. 1 applies the Fifth Amendment to the States.

[5] E.g., *Marchetti* v. *United States*, 390 U.S. 39; *Griffin* v. *California*, 380 U.S. 609; *Garrity* v. *New Jersey*, 385 U.S. 493; *Spevack* v. *Klein*, 385 U.S. 511; *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70; *Haynes* v. *United States*, 390 U.S. 85.

by practical application incriminating, it still requires a defendant to furnish information which the state will use to its own advantage in an effort to convict.

The mandate of the Fifth Amendment precludes the prosecutor from ever extrajudicially questioning an indicted defendant.[6] This was its historical intent recognized in *Brown* v. *Walker,* 161 U.S. 591, 597:

> So deeply did the inequities of the ancient system impress themselves upon the minds of the American colonists that the states, with one accord, made *a denial of the right to question an accused person a part of their fundamental law,* so that a maxim which in England was a mere rule of evidence became clothed in this country with the impregnability of a constitutional enactment (emphasis supplied).

Boyd v. *United States,* 116 U.S. 616 quoted from an English trespass case, contemporary to the drafting of the Fourth and Fifth Amendments and reasoned it was indicative of the Amendment's sanctity (116 U.S. at 630):

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal

[6] Cf. *Massiah* v. *United States,* 377 U.S. 201.

> security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense; it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.

and furnished a guide to their interpretation (116 U.S. at 635):

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*. We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first

presentation, from noticing objections which become developed by time and the practical application of the objectionable law.

The practical application test mentioned in *Boyd* when applied *sub judice* is of real concern and renders the notice of alibi rule fundamentally unfair because:

1. The defendant cannot intelligently decide until the close of the state's case whether he wishes to testify or offer any defense other than his presumption of innocence was not overcome beyond a reasonable doubt. His failure to come forth with his alibi witnesses after having complied with the alibi notice rule will certainly become known to the jury by way of opening and closing statements.

2. The disclosure of defense witnesses can subject these witnesses to *ex parte* examination from a state attorney who can subpoena them to testify without benefit of counsel, and to coercion and intimidation by overly zealous law enforcement officers. These practices are not available to a defendant who cannot act under color of office. Nor would a threatened defense witness feel as a practical matter that he could complain to prosecuting authorities for relief as would a state's witness harassed by an unscrupulous defendant.

The Fifth Amendment in the context *sub judice* is similar to the defendant's Sixth Amendment right to obtain favorable witnesses. *Washington* v. *Texas,* 388 U.S. 14, 19, held:

> The right to offer the testimony of witnesses, and to compel their attendance if necessary, is in plain terms the right to present a defense * * *. Just as an accused has the right to confront the prosecution's witnesses

> for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

The Court recognized in *Garrity* v. *New Jersey*, 385 U.S. 493, 500 "There are rights of constitutional statute whose exercise a State may not condition by the exaction of a price" and in *Marchetti* v. *United States, supra*, 390 U.S. at 57:

> The Government's anxiety to obtain information known to a private individual does not without more render that information public; if it did, no room would remain for the application of the constitutional privilege. Nor does it stamp information with a public character that the Government has formalized its demands in the attire of a statute; if this alone were sufficient, the constitutional privilege could be entirely abrogated by any Act of Congress.

State cases upholding similar alibi provisions[7] have answered the issue on some type of implied waiver theory rejected in *Marchetti* v. *United States, supra*, 390 U.S. at 51,[8] or that the evidence is exculpatory and the witnesses will become known at trial anyway. These conclusions betray the intent of the Founders framing the Amendment and are not practically sound.

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[7] Cases are collected in 55 Journal of "Criminal Law, Criminology and Police Science," 29 and 30 A.L.R.2d 480, "Notice of Alibi Statute."

[8] "To give credence to such 'waivers' without the most deliberate examination of the circumstances surrounding them would ultimately license widespread erosion of the privilege through 'ingeniously drawn legislation.'"

II.

Six Persons Cannot Constitute a Jury

Duncan v. *Louisiana*, 391 U.S. 145 applying the Sixth Amendment to the States sufficiently outlines the history of the jury which need not be elaborated. The reasons why the number twelve finally evolved appears lost in history but there is no dispute that the jury known to the common law meant twelve persons—neither more nor less[9] and this standard was incorporated in the Sixth Amendment.[10] The Amendment would have been redundant to set out this detail because a jury of twelve reaching a unanimous verdict was the only type jury known:[11]

> The right to twelve is a substantial one.[12]
>
> (T)he wise men who framed the Constitution of the United States and the people who approved it were of opinion that life and liberty, when involved in criminal prosecutions, would not be adequately secured except through the unanimous verdict of twelve jurors. It was not for the State, in respect of a crime committed within its limits while it was a Territory, to dispense with that guarantee simply because its people had reached the conclusion that the truth could

[9] *Thompson* v. *Utah*, 170 U.S. 343.

[10] *Callan* v. *Wilson*, 127 U.S. 540.

[11] *Springville* v. *Thomas*, 166 U.S. 707.

[12] Fla. Stat. 73.071 provides for a twelve man jury in all eminent domain cases, 69 Col. L.R. 419. "Trial by Jury in Criminal Cases" notes that only five states have less than twelve man juries for felonies.

> be as well ascertained, and the liberty of an accused be as well guarded, by eight as by twelve jurors in a criminal case. *Thompson* v. *Utah*, 170 U.S. 343, 353.

and undoubtedly insures a more representative community sampling in the venire.

The construction, favorable to the defendant, suggested in *Boyd, supra*, should also apply here; to permit a six man jury is no different in principle from a one man jury or even an advisory jury.

Conclusion

The judgment below should be reversed and the petitioner discharged.

Respectfully submitted,

RICHARD KANNER
Attorney for Petitioner

APPENDIX.

RULE 1.200 NOTICE OF ALIBI

Upon the written demand of the prosecuting attorney, specifying as particularly as is known to such prosecuting attorney, the place, date and time of the commission of the crime charged, a defendant in a criminal case who intends to offer evidence of an alibi in his defense shall, not less than ten days before trial or such other time as the court may direct, file and serve upon such prosecuting attorney a notice in writing of his intention to claim such alibi, which notice shall contain specific information as to the place at which the defendant claims to have been at the time of the alleged offense and, as particularly as is known to defendant or his attorney, the names and addresses of the witnesses by whom he proposes to establish such alibi. Not less than five days after receipt of defendant's witness list, or such other times as the court may direct, the prosecuting attorney shall file and serve upon the defendant the names and addresses (as particularly as are known to the prosecuting attorney) of the witnesses the State proposes to offer in rebuttal to discredit the defendant's alibi at the trial of the cause. Both the defendant and the prosecuting attorney shall be under a continuing duty to promptly disclose the names and addresses of additional witnesses which come to the attention of either party subsequent to filing their respective witness lists as provided in this rule. If a defendant fails to file and serve a copy of such notice as herein required, the court may exclude evidence offered by such defendant for the purpose of proving an alibi, except the testimony of the defendant himself. If such notice is given by a defendant, the court may exclude the testimony of any witness offered by the defendant for the purpose of proving an alibi if the name and address of such witness as particularly as is known to defendant or his attorney is not stated in such notice. If the prosecuting attorney fails to file and serve a copy on the defendant of a list of wit-

nesses as herein provided, the court may exclude evidence offered by the state in rebuttal to the defendant's alibi evidence. If such notice is given by the prosecuting attorney, the court may exclude the testimony of any witness offered by the prosecuting attorney for the purpose of rebutting the defense of alibi if the name and address of such witness as particularly as is known to the prosecuting attorney is not stated in such notice. For good cause shown the court may waive the requirements of this rule.

913.10 NUMBER OF JURORS AND ALTERNATE JURORS.—

(1) Twelve men shall constitute a jury to try all capital cases, and six men shall constitute a jury to try all other criminal cases.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

JOHNNY WILLIAMS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

PER CURIAM.

This is defendant's appeal from a conviction of robbery. His first point on appeal is that the trial court erred in denying his motion for a protective order which he made in response to the State's demand for disclosure of alibi witnesses pursuant to Rule 1.200, Florida Rules of Criminal Procedure.

Appellant argues that the notice of alibi rule is a rule of substantive law, and accordingly is not authorized by Article 5, Section 3, of the Florida Constitution.[1]

Appellant's next point is that Rule 1.200, supra, violates his privilege against self-incrimination as provided by the Florida Declaration of Rights, Section 12, and the Fifth and Fourteenth Amendments of the United States Constitution.

We find no substantial merit in either of these two points on appeal.

Appellant's third and last point raises the question of whether his constitutional rights were violated when the

[1] Article 5, Section 3 of the Florida Constitution provides as follows: "The practice and procedure in all courts shall be governed by rules adopted by the Supreme Court." Florida Rule of Criminal Procedure 1.200 was adopted by the Florida Supreme Court, In Re Florida Rules of Criminal Procedure, Fla. 1967, 196 So.2d 124, 148.

trial court denied his request for a trial by a jury of twelve instead of six. The trial court ruled that the appellant was entitled, under Florida law, to a jury consisting of only six persons; the state contends that the trial court was correct in this ruling. We agree, and base our holding on the United States Supreme Court's ruling in the case of Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444 (1968).

Affirmed.